

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RICHARD V. FORTNER, Jr.**

Claimant

VS.

**SHAWNEE COUNTY**

Respondent

Self Insured

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Docket No. 262,470

**ORDER**

Claimant appealed the preliminary hearing Order Denying Compensation dated March 15, 2001, entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

This is a claim for a December 12, 2000 accident. Claimant slipped and fell as he was going to work and walking from a parking lot to the White Lakes Mall where respondent and others maintain offices and retail businesses. The issue before the Board is whether claimant's accident arose out of and in the course of his employment with respondent.

**FINDINGS OF FACT**

After reviewing the record compiled to date, the Appeals Board finds:

- (1) Richard V. Fortner, Jr., worked for Shawnee County at an office located at the White Lakes Mall in Topeka, Kansas.
- (2) At approximately 7:30 a.m. on December 12, 2000, Mr. Fortner was injured when he slipped and fell as he was walking in an ice and snow covered parking lot on his way to work.
- (3) Along with other tenants, Shawnee County leased space in the White Lakes Mall adjacent to the parking lot where claimant fell. Shawnee County neither owned nor maintained the parking lot where Mr. Fortner fell but, like other tenants, its lease agreement provided for respondent to pay its "pro-rata share of Common Area Maintenance."
- (4) Shawnee County designated both the area of the parking lot where Mr. Fortner was to park and the door that he was to use to enter the Mall.

(5) Mr. Fortner testified that he had not seen the public or employees of the other tenants of the White Lakes Mall use the area of the parking lot where he was injured. But his testimony fails to establish that the parking lot was not available to the public or to the other tenants.

Q. But if I were a patron going into that restaurant or if I were someone using that child care center, this would be the parking lot that I would use? Not necessarily where you're exactly designated to park, but the same general parking lot? No barriers between your spaces and the next spaces to you?

A. Oh, no, I haven't seen any.

Q. So the public using those other restaurants would use the same general parking lot, wouldn't they?

A. I would think so.<sup>1</sup>

(6) Although the door was not available to the general public or used by the public to visit either Shawnee County or the other tenants, the door that Mr. Fortner used was also available for the other tenants and their employees to use.

Q. Okay. So what I am getting at is that the entrance that you used, right next to it is another entrance that is used by other people?

A. Well, and the other entrance that is used is used for employees of the mall. It is about 45 foot from where my door is.

Q. Employees that don't work for Shawnee County?

A. Employees that – people that work at the mall.

Q. Okay. And working at the mall, you mean work in other businesses at the mall but –

A. Right.

Q. – not Shawnee County?

A. Right. They could go in our door, I mean, because that is the back entrance of the door. And when they go in they would have to go down three steps and 20 and there is a hallway going to other businesses there.

Q. So they could use your entrance?

A. They could use our door, but that is for employees of the mall.<sup>2</sup>

#### **CONCLUSIONS OF LAW**

(1) The preliminary hearing Order Denying Compensation should be affirmed.

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<sup>1</sup> Transcript of March 9, 2001 Preliminary Hearing at 22.

<sup>2</sup> Transcript of March 9, 2001 Preliminary Hearing at 19-20.

(2) Accidents occurring while employees are on their way to work are generally not compensable. But accidents that occur either on an employer's premises or on the only available route to work may be compensable depending upon the facts.

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. **An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.**<sup>3</sup> (Emphasis added.)

(3) The above statute is a codification of Kansas' "going and coming" rule. And the statute permits only two exceptions to that rule - a "premises" exception and a "special hazard" exception.<sup>4</sup>

(4) Kansas narrowly construes "premises" to be a place either controlled by the employer or where a worker may reasonably be when performing his or her job duties.<sup>5</sup>

(5) Because of that construction, the Board concludes that the parking lot was not a part of Shawnee County's premises. The lot was neither owned nor maintained by respondent. The lot was used by other tenants and their visitors. By designating where its employees should park, Shawnee County did not exercise such control over the parking lot so as to render it part of its premises. Likewise, paying a pro-rata share of the cost of maintaining the common areas, including the parking lot, did not constitute such control.

(6) Before the "special hazard" exception will apply, the accident (1) must occur on the only route available to or from work, (2) the route must possess a special risk or hazard, and (3) the route must be used by the public, if at all, only to deal with the employer. The claimant must prove all three elements.

(7) The Board concludes that Mr. Fortner has failed to prove the third requirement of the "special hazard" exception because the door was available and used by other building tenants and their employees for purposes other than in dealings with Shawnee County,

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<sup>3</sup> K.S.A. 44-508(f).

<sup>4</sup> Thompson v. Law Offices of Alan Joseph, 256 Kan. 36, 883 P.2d 768 (1994).

<sup>5</sup> Thompson, Syl. ¶ 1.

and the area of the parking lot where claimant fell may also have been used by the public for purposes other than for dealings with Shawnee County.

**WHEREFORE**, the Appeals Board affirms the preliminary hearing Order Denying Compensation dated March 15, 2001, entered by Administrative Law Judge Brad E. Avery.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2001.

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BOARD MEMBER

c:     Roger D. Fincher, Topeka, KS  
       Larry G. Karns, Topeka, KS  
       Brad E. Avery, Administrative Law Judge  
       Philip S. Harness, Director